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JURISDICTIONAL STATEMENT

A plaintiff/employee/Appellant filed in the Circuit Court of the City of St. Louis a wrongful discharge action for money damages based upon the "whistleblower" exception to Missouri's employment-at-will doctrine. Defendant/Employer/Respondent filed a Motion for Summary Judgment which the trial court granted by Judge Thomas Grady's Order and Judgment of September 5, 2003. No post-trial Motions were filed. Appellant appealed. Jurisdiction of the Appeal in the Court of Appeals is based upon Article 5, Section 3 of the Missouri Constitution, and RSMo. 512.020. The trial court Order and Judgment is a final judgment that disposes of all parties' claims. The Missouri Court of Appeals, Eastern District, issued its Order affirming the trial court November 2, 2004. The Missouri Supreme Court accepted transfer of the case from the Missouri Court of Appeals, Eastern District, March 1, 2005. Jurisdiction in the Supreme Court is based upon Article 5, Section 10 of the Missouri Constitution and Supreme Court Rule 83.02.

STATEMENT OF FACTS

Plaintiff/Appellant, Richard Kunkel (hereinafter "Appellant"), was born June 5, 1945. He has a Bachelor's Degree in Applied Mathematics, and a Masters and PhD in Engineering. He began working for defendant, Anheuser-Busch, Inc., in 1981. Prior to this, he held positions as a utility company staff engineer, a professor of industrial engineering at General Motors Institute, and a plant supervisor for a division of General Motors. At Anheuser-Busch, between 1981 and 1998, he held various positions, all related to industrial engineering. (L.F. 156, 157, 326). Defendant Anheuser-Busch, Inc., employed him until December 31, 1997.

Defendant Anheuser-Busch Companies employed him between January 1, 1998, and June 30, 1998 (L.F. 327). For ease of reference, both will be defined as "A-B" (L.F. 10, fn. 1), and referred to herein as Respondent or "A-B."

Respondent policy is to perform annual performance evaluations for all employees (L.F. 171, paragraph 22; 269, 308, and 316).

From March, 1982, through November, 1993, Appellant had received annual performance evaluations reflecting his work performance as from above "Good" to above "Very Good"; and he was given annual raises from March, 1982, through November, 1991, of between 5% and 10.4% of his annual compensation. (L.F. 317).

In the early 1990's, he was assigned to A-B's Productivity and Improvement Group. At that time, the Productivity and Improvement Group was a stand-alone group in A-B's Administrative Division. The group's productivity and improvement functions were split into two sub-areas, Brewing P.I. and Operations P.I. Appellant was in the Brewing P.I. and reported directly to Ted Luhrs. Ted Luhrs reported to John Powell, Director of the Productivity and Improvement Group. John Powell reported to Jim Hoffmeister, Vice President of the Administration Division. (L.F. 11 and 101).

In 1992, Appellant was assigned to a project involving the consolidation of A-B's merchandising operations in Mt. Vernon, Illinois. At that time, A-B had contracted with M&R Warehouse, Inc. ("M&R"), in Mt. Vernon to receive, store, repackage, ship and transport A-B's point-of-sale materials, promotional items, and other related materials to wholesalers. M&R stored these materials in approximately 14 warehouses it owned in and around Mt. Vernon,

Illinois. (L.F. 11 and 39-44). Prior to this, Appellant had worked on an A-B warehousing and distribution project ("PPG" Project) which involved a similar warehousing and distribution operation to store and distribute A-B promotional items to retail customers as opposed to the wholesalers to which M&R distributed A-B promotional items (L.F. 39, 235-236). PPG was an operating division of A-B. M&R, through performing similar functions, was not (L.F. 235-236).

M&R is a corporate entity distinct from Anheuser-Busch (L.F. 220), and M&R had only A-B as a warehouse customer (L.F. 214, 215, and 243, line 22, through 244, line 1). M&R did warehousing work for A-B in 10 to 17 buildings in Mt. Vernon, Illinois (L.F. 217 through 219). M&R basically did whatever A-B told it to do (L.F. 223, line 20 through 224, line 22; 225, lines 18 - 23; 231, lines 2-4; 237, lines 4-11).

Bruce Wilson was the general manager of M&R (L.F. 216).

Appellant began working on a review of the warehousing operations at M&R in Mt. Vernon, Illinois, in 1992 (L.F. 188 through 193).

There was asbestos in an M&R building in Mt. Vernon, Illinois, in which A-B inventory was stored (L.F. 223, lines 2, to 226, line 25). This harmful material was on and upon A-B inventory stored at M&R. (L.F. 281, line 4, to 288, line 24). A-B directed the testing for asbestos and reimbursed M&R for the cost of testing (L.F. 222, lines 2 through 223, line 13; 226, lines 13-18).

Appellant reported this asbestos situation to his supervisor, Ted Luhrs (L.F. 285, lines 2 - 8).

Ted Luhrs was aware of the health hazards of asbestos (L.F. 285, lines 20 through, 287, line 17).

Ted Luhrs reported the asbestos situation to John Powell, his supervisor (L.F. 289, lines 1-5), and Appellant and Ted Luhrs both reported this asbestos situation to John Powell (L.F. 298, lines 16 - 25).

Cleaning solvent used to clean A-B's displays was disposed of down the wastewater drains at M&R, and Appellant told Ted Luhrs of the disposal of this cleaning solvent (L.F. 293, lines 15 - 24, and 227, lines 21 - 23).

Appellant discussed improper charges by M&R with Bruce Wilson, M&R's manager, (L.F. 240 through 242); and Appellant discussed and reported to his supervisor, Ted Luhrs, the overcharges (L.F. 194 through 198, and 292 through 293).

M&R and the merchandising department of A-B had a long relationship under the terms of which A-B's merchandising employees, such as Terry Floyd, could tell M&R what to do and M&R would do it. Merchandising could buy whatever it wanted through M&R and add it to M&R's invoice to A-B and M&R would be paid by A-B (L.F. 240, lines 4 - 14). Merchandising did just that on a number of occasions; this included ordering personal items for merchandising employees (L.F. 240, line 15, through 242, line 5). A-B Merchandising employees as well as M&R employees wanted to get Appellant thrown off the M&R project to keep him from interrupting this improper business arrangement (L.F. 242, lines 14-25).

Appellant was pulled off the job at M&R in Mt. Vernon after a June 10, 1994, letter from Bruce Wilson, M&R's manager, to Terry Floyd, an A-B merchandising employee (L.F.

129 through 131). Terry Floyd, an employee of A-B's merchandising department, authorized, edited, and approved the Bruce Wilson letter to Terry Floyd of June 10, 1994 (L.F. 228, line 11 through 229, line 17; 230, line 12 through 231, line 22; 232, lines 10 through 16; 235, lines 1 through 14; 238, lines 10 through 24).

This resulted in a June 1994, meeting at A-B to discuss this letter, attended by Appellant, Luhrs, Powell and Hoffmeister which resulted in Appellant being pulled off of the M&R job (L.F. 258, 259; 274-278).

The Wilson letter of June 10, 1994, was circulated to A-B employees Michael Sullivan, Scott Murdock, and Terry Floyd, and discussed with Sam Mateer and Bruce Wilson, M&R employees (L.F. 129).

No one investigated the truth of the charges against Appellant contained in Bruce Wilson's June 10, 1994, letter to Terry Floyd (L.F. 261, 295, and 297).

After being pulled off of the M&R job in June, 1994, Appellant complained to Ted Luhrs that he was given jobs that he felt were beneath his level of experience and expertise, dull, and not professionally challenging (L.F. 279 and 280).

Appellant received no raises for the years 1992, 1993, 1994, 1995, and 1996, and only a small raise in 1997 (L.F. 317).

Appellant was given no performance evaluations for 1994, 1995, and 1996 (L.F. 202, 268-269, 317).

In the first quarter of 1997, prior to the reduction in force, A-B's Productivity and Improvement Group was combined with Packaging Technology and the Research and

Development Group to become the Productivity and Technology Department. Kenn Reynolds, the former Vice President of the Research and Development Group, was selected to head the new Productivity and Technology Department. Appellant, along with the other Brewing P.I. employees, continued to report to Luhrs (L.F. 12).

When the Brewing P.I. group was reorganized in November, 1997, Appellant was told he was to be placed in a Resource Pool primarily for reassignment within the company (L.F. 207, line 22 through 208, line 6).

Appellant met A-B's job expectations immediately before the November, 1997, reorganization (L.F. 324, 325).

Due to A-B's lower than expected corporate earnings in 1997, Kenn Reynolds was instructed to reduce costs in the Productivity and Technology Department by approximately $2 Million. To achieve this reduction, Reynolds decided to reorganize the Productivity and Technology Department and to eliminate certain functions that were being performed or could be performed by other Divisions within A-B (L.F. 12).

In planning the reorganization, it was Reynolds' goal to achieve a 25% reduction in force. To accomplish this objective, Reynolds first eliminated all open positions (L.F. 12).

Reynolds did not eliminate the functions of the Brewing P.I. group, but rather transferred some of them, specifically Appellant's, to others (L.F. 250, line 14 through 251, line 2; 254; 203; 264; 266). Reynolds did not eliminate the capacity planning functions; instead he transferred them to others (L.F. 254 and 255).

James Hoffmeister was involved in the November, 1997, personnel decisions regarding Productivity and Technology reorganization involving Appellant, along with Kenn Reynolds (L.F. 89, line 24 through 90, line 16; 248, lines 1 through 16; 249, lines 7 through 18; 252, line 19 through 253, line 24).

Appellant was not told he was being laid off and sent to the Resource Pool (L.F. 207). He was told, instead, he was being placed into the Resource Pool primarily for reassignment to another job with A-B (L.F. 207 and 208).

The Resource Pool is an in-house job transition service A-B maintains for employees who lose their position due to a reorganization or reduction in force. Employees who are placed in the Resource Pool continue to receive their full salary and benefits for up to 6 months while they seek other opportunities at A-B or another job outside the company. Employees who are assigned to the Resource Pool may also be assigned to various projects in other departments on a temporary basis (L.F. 13).

Once in the Resource Pool, on and between January 1, 1998, and June 30, 1998, Appellant began applying for open positions with A-B. In all, Appellant applied for 30 positions with A-B. He was not hired for any of them (L.F. 136 - 140).

Although Appellant applied for nearly 30 positions with A-B before June 30, 1998, he admits he does not know who made the hiring decisions with respect to these jobs, who ultimately filled these jobs, or the nature of the successful applicants' qualifications (L.F. 13).

From January 1, 1998, through June 30, 1998, Appellant was paid by Anheuser-Busch Companies, Inc.; not Anheuser-Busch, Inc. (L.F. 173; 327).

On June 30, 1998, Appellant's time in the Resource Pool elapsed and his employment with A-B ended.

The requirements for job 98-1502 were reformulated after Appellant applied for it (L.F. 300 through 304).

Appellant did not begin applying for positions outside of A-B until after his time in the Resource Pool had elapsed (L.F. 14).

On February 4, 1999, Appellant filed a charge of discrimination with the EEOC alleging that he was discharged on account of his age (L.F. 14). On February 4, 1999, Appellant also submitted an Affidavit in support of his charge of discrimination in which he states that age was a "primary factor" in the adverse employment actions taken against him (L.F. 14).

The deposition of Bruce Wilson, M&R's manager, was taken May 9, 2000 (L.F. 209, 210). This is the first time Appellant became aware of A-B's participation in authoring this letter.

On October 12, 2000, the United States District Court for the Eastern District of Missouri, granted Summary Judgment in favor of A-B on Appellant's Federal age discrimination claim (L.F. 14) and left the state wrongful discharge claim to the state courts (L.F. 337). That decision was affirmed by the United States Court of Appeals for the 8th Circuit on August 15, 2001 (L.F. 14).

On November 15, 2002, Appellant filed the instant action for wrongful discharge in the Circuit Court (L.F. 14).

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN REQUIRING THAT APPELLANT PROVE THAT HIS WHISTLEBLOWING WAS THE EXCLUSIVE CAUSE FOR HIS TERMINATION FROM EMPLOYMENT FOR THE REASON THAT REQUIRING AN EXCLUSIVE CAUSATION ELEMENT IMPOSES AN UNFAIR BURDEN ON A PLAINTIFF BECAUSE SUCH STANDARD MAKES IT PRACTICALLY IMPOSSIBLE FOR A PLAINTIFF TO PROVE A CLAIM BASED ON THIS FORMULATION OF THE CAUSATION ELEMENT OF THIS TORT.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 SW2d 371 (Mo. Banc 1993).

Brenneke v. V.F.W., 985 SW2d 134 (Mo. App. W.D. 1999).

Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 SW2d 147 (Mo. App. E.D. 1995).

Boyle v. Vista Eyewear, Inc., 700 SW2d 859 (Mo. App. W.D. 1985).

II.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT'S WHISTLEBLOWING ACTIVITIES CULMINATING IN THE JUNE, 1994, MEETING RESULTING IN THE REMOVAL OF APPELLANT FROM THE M&R JOB, WERE THE CAUSE OF HIS 1997 PLACEMENT IN THE RESOURCE POOL AND THE CAUSE OF HIS NOT BEING REHIRED AFTER DECEMBER 31, 1997, BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR A-B IN THAT THE AFFIDAVIT OF KENN REYNOLDS, CONTENDING, FIRST, THAT APPELLANT'S 1997 PLACEMENT IN THE RESOURCE POOL WAS PART OF A GENERAL COST REDUCTION DECISION AND, SECOND, THAT REYNOLDS HAD NO KNOWLEDGE OF THE M&R ACTIVITY, IS GENUINELY DISPUTED BECAUSE JAMES HOFFMEISTER WAS A KEY PARTICIPANT IN BOTH THE JUNE, 1994, DECISION TO REMOVE APPELLANT FROM THE M&R JOB AND ALSO A KEY PARTICIPANT WITH KENN REYNOLDS IN THE 1997 DECISION TO PLACE APPELLANT IN THE RESOURCE POOL.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 SW2d 371 (Mo. Banc 1993).

Brenneke v. V.F.W., 984 SW2d 134 (Mo. App. W.D. 1999).

Boyle v. Vista Eyewear, Inc., 700 SW2d 859 (Mo. App. W.D. 1985).

III.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT'S WHISTLEBLOWING ACTIVITIES WERE THE CAUSE OF HIS TERMINATION BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR A-B IN THAT APPELLANT'S PERSONAL ASSESSMENT THAT HIS DISCHARGE AND A-B'S FAILURE TO REHIRE HIM WAS BASED ON HIS AGE DOES NOT PRECLUDE HIS LATER CONTENTION THAT HIS TERMINATION WAS EXCLUSIVELY CAUSED BY HIS WHISTLEBLOWING WHEN AGE IS JUDICIALLY DECLARED BY A FEDERAL COURT NOT TO BE THE REASON FOR HIS TERMINATION.

Morris v. American National Can Corp., 988 F.2d 50 (8th Cir. 1993).

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 SW2d 371 (Mo. Banc 1993).

Walsh v. Terminal Railroad Association of St. Louis, 196 SW2d (Mo. 1946).

Brenneke v. V.F.W., 984 SW2d 134 (Mo. App. W.D. 1999).

IV.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE CONDUCT THAT APPELLANT COMPLAINED OF WAS CONDUCT OF HIS EMPLOYER BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR A-B IN THAT THE RELATIONSHIP BETWEEN A-B AND M&R WAS SUCH THAT M&R WAS NOT A "THIRD PERSON" AS TO THE PARTIES, BUT RATHER THE ALTER EGO, SERVANT, OR AGENT OF A-B, SUCH THAT CONDUCT BY M&R COULD BE IMPUTED TO A-B.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 SW2d 371 (Mo. Banc 1993).

Madsen v. Lawrence, 366 SW2d 413 (Mo. 1963).

Saidawi v. Giovanni's Little Place, Inc., 987 SW2d 501 (Mo. App. E.D. 1999).

V.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT'S WHISTLEBLOWING ACTIVITIES WERE THE CAUSE OF HIS TERMINATION BASED ON WHAT THE TRIAL COURT INTERPRETED AS A SUBSTANTIAL PASSAGE OF TIME BETWEEN HIS COMPLAINTS AND THE DECISION TO TERMINATE HIM BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR A-B IN THAT EVEN THOUGH APPELLANT'S ACTUAL EMPLOYMENT TERMINATION OCCURRED JUNE 30, 1998, A-B'S EFFORTS TO CAUSE HIM TO QUIT EMPLOYMENT BEGAN IN AT LEAST JUNE, 1994, WITH THE JUNE 10, 1994, DAMAGING LETTER REGARDING HIS JOB PERFORMANCE AT M&R, ACTUALLY AUTHORED BY A-B. EFFORTS TO CAUSE APPELLANT TO QUIT HIS EMPLOYMENT CONTINUED CONSISTENTLY FROM 1994 UNTIL THE DECISION TO PLACE HIM IN THE RESOURCE POOL IN 1997, AND HIS TERMINATION IN 1998, AND INCLUDED PULLING HIM OFF THE M&R JOB IN 1994, NOT TRYING TO DETERMINE THE TRUTH OF THE JUNE 10, 1994, ALLEGATIONS EVEN THOUGH THEY WERE WIDELY CIRCULATED WITHIN A-B, FAILING TO GIVE HIM RAISES, PROMOTIONS, OR PERFORMANCE EVALUATIONS FOR 1994, 1995, AND 1996, ASSIGNING HIM DEMEANING WORK, AND FINALLY NOT REHIRING HIM FROM THE RESOURCE POOL. THIS COURSE OF CONDUCT DEMONSTRATES THAT THERE WAS NO TRUE "SUBSTANTIAL PASSAGE OF TIME BETWEEN HIS COMPLAINTS AND

HIS DISCHARGE," BUT RATHER A CONTINUOUS COURSE OF CONDUCT BY A-B FROM BEFORE JUNE 10, 1994, UNTIL AFTER JUNE, 1998.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 SW2d 371 (Mo. Banc 1993).

Bell v. Dynamite Foods, 969 SW2d 847 (Mo. App. E.D. 1998).

ARGUMENT

I.

THE TRIAL COURT ERRED IN REQUIRING THAT APPELLANT PROVE THAT HIS WHISTLEBLOWING WAS THE EXCLUSIVE CAUSE FOR HIS TERMINATION FROM EMPLOYMENT FOR THE REASON THAT REQUIRING AN EXCLUSIVE CAUSATION ELEMENT IMPOSES AN UNFAIR BURDEN ON A PLAINTIFF BECAUSE SUCH STANDARD MAKES IT PRACTICALLY IMPOSSIBLE FOR A PLAINTIFF TO PROVE A CLAIM BASED ON THIS FORMULATION OF THE CAUSATION ELEMENT OF THIS TORT.

The standard of review an appeals court applies to an appeal of a judgment granting summary judgment is de novo review. The reviewing Court reviews the record in the light most favorable to the party against whom judgment was entered and accords to non-movant the benefit of all reasonable inferences from the record. The appeals court need not defer to the trial court's order granting summary judgment. ITT Commercial Finance Corp. V. Mid-American Marine Supply, 854 SW2d at 371, 376 (Mo. Banc 1993).

The Missouri Supreme Court in the 1993 ITT Commercial case held that:

> The burden on a summary judgment movant is to show a right to judgment flowing from facts about which there is no genuine dispute. Summary judgment tests simply for the existence, not the extent, of these genuine disputes. Therefore, where the trial court, in order to grant summary judgment, must overlook

> material in the record that raises a genuine dispute as to the facts underlying the movant's right to judgment, summary judgment is not proper. 854 SW2d at 378.

Additionally, at p.381, ITT Commercial, outlined three separate methods for a defending party (as here) to establish a right to summary judgment by (1) negating *any one* of the claimant's elements, or (2) by showing the claimant will not be able to produce evidence sufficient to allow the trier of fact to find the existence of *any one* of claimant's elements, or (3) that there are no genuine disputes as to affirmative defenses. In this case, there are no affirmative defenses pleaded, and so the trial court's analysis in its Order suggests it found no genuine disputes as to the allegations in Kenn Reynolds' affidavit, the clear thrust of which is that he was the person who decided to place Appellant in the Resource Pool; that he had no knowledge of the M&R whistleblowing; and that Appellant was simply caught in a 1997 cost cutting program (L.F. 28-30), and therefore Appellant cannot prove his M&R whistleblowing complaints was the exclusive cause for his termination. Thus, A-B argues that there is no genuine issue as to the causation element in Appellant's case.

Boyle v. Vista Eyewear, Inc**.**, 700 SW2d 859 at 878 (Mo. App. W.D. 1985), recognized the public policy exception to the employment-at-will doctrine. Lynch v. Blanke Baer & Bowey Krimko, Inc., 901 Sw2d 147 (Mo. App. E.D. 1995) and Bell v. Dynamite Foods, 969 SW2d 847 (Mo. App. E.D. 1998) hold that the elements a claimant must prove to prevail on a claim for wrongful discharge because of reporting violations of law or public policy by the employer are (1) that he reported to supervisors or to public authorities serious misconduct

that constituted violations of law and of well-established and clearly mandated public policy; (2) that the employer discharged him; and (3) there was an exclusive causal connection between the discharge and the reporting of violations to superiors or to public authorities. There is proof that Appellant did report violations of law (L.F. 194-201, 280, 281, 292, 293) and that he was discharged (L.F. 12, 13). Therefore, the trial court's judgment granting A-B Summary Judgment must be based on his conclusion that there is no genuine dispute as to the exclusive cause of Appellant's discharge.

The Respondent's Motion for Summary Judgment, the Trial Court's grant of Summary Judgment, and the Eastern District's affirmance of the Trial Court's grant of Summary Judgment, all presumed that Appellant must prove exclusive causation, and relied on this in their respective arguments and decisions.

In terms of framing the issue of whether or not the exclusive discharge element was a reason for the trial court's decision and its affirmance by the Court of Appeals, Appellant would direct the court's attention to A-B's arguments in its Motion for Summary Judgment which are primarily bottomed on "exclusive causation" (L.F. 17, 22-23), Appellant's Memorandum In Opposition (L.F. 179, 180), the trial court's Judgment and Order (A6, A10), and the Court of Appeals' Opinion (A21, A22, A24), particularly its final statement in its Opinion, "Because we hold there was not an exclusive causal connection between Kunkel's whistleblowing actions in 1994 and his termination from Anheuser-Busch in 1998, we do not need to address Kunkel's other points on appeal." (A24). Appellant suggests that it is abundantly clear that the exclusive causation element is the reason Summary Judgment was

granted by the trial court and affirmed on appeal. Accordingly, it is Appellant's position that the exclusive causation element is determinative of the outcome below. It is Appellant's position that, had the causation element of this tort been different, that is to say, had it been such as to allow a weighing by the fact finder of the relative weight or preponderance of the reasons for the termination, the case would still be alive and would be headed to a jury.

Appellant would argue that making exclusive causation a required element for plaintiff to prevail, is completely at war with the real world dynamics in which a case of this type arises.

Assuming the normal and commonly understood use of the term "exclusive" cause as the "only" cause, it follows that if an employer can show there is another cause for the termination, then a trial court would be required to grant defendant a Summary Judgment in a case in which a plaintiff could not controvert the averment that there was another reason for the discharge; or a trial court would be required to direct a verdict at the close of all the evidence, or at the conclusion of the plaintiff's case; or a jury would be precluded from finding in favor of a plaintiff. This would be the case even if the other reason or reasons for the discharge were very minor or minimal causes for the termination. For example, in a situation in which the whistleblowing were 99% of the reason for the discharge, and some other event or occurrence were 1% of the reason for the discharge, requiring exclusive causation would mean that a plaintiff could not recover. Or, if there were several reasons for a termination, the whistleblowing being, for example, 60% of the reason for the discharge, and other reasons being 40% of the reason for the discharge, the plaintiff could not prevail and should be directed out. Or, whistleblowing could be, as in this case, a reason for the termination; and a cost-

cutting program by the defendant could be another reason for the termination. Even if, for example, the cost-cutting were used as a cover or pretext to get rid of a troublesome employee, as Appellant argues is the situation in this case, the plaintiff could not prevail because of the exclusive causation requirement, even in the face of an evil motive on the part of a defendant. Appellant respectfully suggests that these suggested fact patterns demonstrate that it is patently unfair to require a plaintiff to prove exclusive causation.

In most reasonably anticipated fact patterns, there would several "reasons" or "causes" for a termination, or mixed motives for the termination. There are simply too many daily interactions between an employer and an employee for there not to be points of friction, areas of disagreement, absenteeism, tardiness, insubordination (which, itself, is a very subjective concept), all of which could be reasons for a discharge, and, in light of the exclusivity requirement, would preclude a plaintiff from recovery.

Appellant would suggest that this Court consider adjusting the common-law formulation of this tort to conform to the realities of day-to-day employer/employee relations. Otherwise, this purported remedy, which is clearly designed to be of benefit to the general public, is hollow and practically meaningless. Brenneke, at page 140, seems to suggest that the exclusivity element be modified so as to direct the fact finder to determine what is the preponderant or primary reason for the discharge. Appellant respectfully suggests that this would seem to make the remedy a fair one for all concerned, and the "narrow exception" standard envisioned for this cause of action would not be appreciably broadened by such a clarification. Moreover, an employer is easily positioned to be able to produce any relevant

evidence that the termination was caused by any deficiencies in the discharged employee's work.

In Federal employment law, McDonnell Douglas Corp. v. Green, 411 US 792, 93 S.Ct. 1817, 36 L.Ed.2d 669 (1973) requires a plaintiff to show an improper motive on the part of an employer acting against an employee; the burden then shifts to an employer to show an acceptable or legal reason for the action; and the plaintiff then must show that the reason the employer gave is pretextual. In the Federal formulation, the plaintiff must demonstrate that there is a causal connection between the protected activity and the discharge. This is a standard that does not require exclusivity of causation, but determines causation based on a preponderance of the evidence as to the issues.

Lynch v. Blanke Baer & Bowey Krimko, Inc., supra, enunciated the exclusive causation element of this tort in Missouri common law. Bell, supra, followed Lynch. This element was questioned by the Western District and its review urged on this Court in Brenneke. Several other jurisdictions determine the causation issue not based on exclusive causation but rather by allowing a fact finder to make a determination based on various formulations other than exclusivity.

The Plaintiff may be required to show that his or her protected conduct or status was a "substantial factor" in causing the termination, Guy v. Mutual of Omaha Ins. Co., 79SW3d 528, (Tenn. 2002); Allison v. Housing Authority of City of Seattle, 118 Wash.2d 79, 821 P2d 34, (1991). Other courts speak more generally in terms of the public policy linked conduct having caused the dismissal. Sedlacek v. Hillis, 145 Wash.2d 379, 36 P3d 1014 (2001). In some

courts, the shifting burden of persuasion approach generally used in Federal Civil Rights cases is applied. Hubbard v. Spokane County, 146 Wash.2d 699, 50 Pacific3d 602, (2002); Bammert v. Don's Super Value, Inc., 254 Wis.2d 347, 2002 WI 85, 646 NW2d 365, (2002). Under this approach, the initial burden is on the plaintiff to show that the termination may have been due to a reason violating public policy; the burden then shifts to the defendant to articulate another reason for the termination; and the ultimate burden is on the plaintiff to show that the defendants' proffered reason is a pretext. Tiernan v. Charleston Area Medical Center, Inc., 212 W.Va. 859, 575 SE2d 618 (2002).

When the defendant is shown to have had mixed motives in terminating the plaintiff, the motives may need to be analyzed with respect to whether all of the motives violate public policy; if not, the plaintiff will be required to establish under the applicable standard that the motive or motive violating public policy caused the termination. Balog v. LRJV, Inc., 204 Cal. App.3d 1295, 250 Cal. Rptr. 766 (4th Dist. 1988).

It is frequently held that a plaintiff in a wrongful discharge action is required to prove his or her case by a preponderance of the evidence. Doud v. Country Wide Home Mortgage Loan, 1997 W.L. 292, 127 (Kan. 1997); Ortega v. IBP, Inc., 255 Kan. 513, 874 P2d 1188 (1994); Chavez v. Manville Products Corp., 108 N.M. 643, 777 P2d 371 (1989); Paul v. P.B.-K.B.B., Inc., 801 SW2d 229 (Tex. App. Houston 14th Dist. 1990).

In analyzing this exclusive causation element, it appears designed to defeat a plaintiff's claim at several levels. First, in a Motion for Summary Judgment if a defendant can present a reason for the discharge, other than the whistleblowing, a reason that plaintiff cannot refute

because it is, in fact, true and accurate, then, even though it may be pretextual, or a minor or insignificant reason for the discharge, a trial court should arguably grant the Motion for Summary Judgment because, by definition, the whistleblowing cannot be the exclusive cause for the discharge. Second, if a plaintiff survives a Motion for Summary Judgment, then this exclusivity standard would be available to defeat the plaintiff's case at trial by either a Motion for Directed Verdict at the close of the plaintiff's case, or at the conclusion of all the evidence, based on essentially the same argument, i.e. that the whistleblowing cannot be the exclusive/only reason for the discharge and, therefore, the plaintiff cannot prevail. Next, if the case got to a jury instructed on the exclusivity causation standard, it would seem that a defendant would be easily able to demonstrate to a jury that the law requires them to return a verdict for the defendant because the whistleblowing was not the exclusive cause for the discharge. Thus, it would seem that a plaintiff could prevail only if a trial judge and a jury would essentially ignore the elements of this cause of action in the case law and jury instructions based thereon. Appellant suggests that under the real world dynamics of the occurrence of a claim of this kind, and its presentation in court, the remedy that is ostensibly provided by case law for retaliation against a whistleblower is hollow and practically meaningless. Appellant suggests that this cannot be the intent of those who formulated this cause of action, intending it to be a true remedy for a true wrong and a benefit for the public at large.

II.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT'S WHISTLEBLOWING ACTIVITIES CULMINATING IN THE JUNE, 1994, MEETING RESULTING IN THE REMOVAL OF APPELLANT FROM THE M&R JOB, WERE THE CAUSE OF HIS 1997 PLACEMENT IN THE RESOURCE POOL AND THE CAUSE OF HIS NOT BEING REHIRED AFTER DECEMBER 31, 1997, BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR A-B IN THAT THE AFFIDAVIT OF KENN REYNOLDS, CONTENDING, FIRST, THAT APPELLANT'S 1997 PLACEMENT IN THE RESOURCE POOL WAS PART OF A GENERAL COST REDUCTION DECISION AND, SECOND, THAT REYNOLDS HAD NO KNOWLEDGE OF THE M&R ACTIVITY, IS GENUINELY DISPUTED BECAUSE JAMES HOFFMEISTER WAS A KEY PARTICIPANT IN BOTH THE JUNE, 1994, DECISION TO REMOVE APPELLANT FROM THE M&R JOB AND ALSO A KEY PARTICIPANT WITH KENN REYNOLDS IN THE 1997 DECISION TO PLACE APPELLANT IN THE RESOURCE POOL.

The standard of review is de novo, ITT Commercial, supra.

The affidavit of Kenn Reynolds upon which the trial court apparently heavily relied completely understates or misstates the role James Hoffmeister played in Appellant's situation with A-B from 1994 through 1997. A-B Vice President James Hoffmeister, in his deposition, testified that the personnel decisions resulting in Appellant's 1997 placement in the Resource Pool and eventual termination were made by Hoffmeister and Reynolds together (L.F. 89, line 24 through 90, line 16; 248; 249; 252; and 253). The thrust of Reynolds' affidavit would

appear to be to remove Hoffmeister's fingerprints from the action. "The remaining employees were placed (emphasis added) in the Resource Pool; ...Richard Kunkel ..." (L.F. 29, paragraph 7). "Richard Kunkel was placed (emphasis added) in the Resource Pool because his group was eliminated and he was not selected by the Brewing Division." (L.F. 30, paragraph 9). This affidavit does not mention Hoffmeister. However, Hoffmeister's deposition testimony clearly disputes, if not refutes, Reynolds' affidavit by making Hoffmeister's role in placing Appellant in the Resource Pool in 1997, far more significant than suggested by Reynolds' affidavit. (L.F. 89 and 90; 248; 249; 252; and 253). Hoffmeister even suggested that Reynolds may have been involved in the 1994 decision to remove Appellant from the M&R job (L.F. 252, lines 12 through 18).

A-B strongly asserts, in the face of clear deposition testimony of Hoffmeister to the contrary, that "he [Reynolds] made the decision to select Appellant for layoff in November 1997 ..." (L.F. 18).

The reason for this position by A-B, via Reynolds' affidavit, is that Hoffmeister was the highest level decision maker involved in the June, 1994, meetings resulting in Appellant being pulled off the M&R job. (L.F. 94, line 21 to 97, line 16). A-B has to attempt to minimize Hoffmeister's role in the 1997 personnel decisions because of his role in the 1994 M&R action that seems to, in hindsight, have marked the beginning of the end of Appellant as A-B's employee. It is noteworthy that in their depositions, Appellant (L.F. 65 and 66), John Powell (L.F. 105, lines 5-25; 109, lines 2-22), and Ted Luhrs (L.F. 118, lines 21-25; 119, lines 12-25) all are clear in their recollection of the June, 1994, meeting with Hoffmeister regarding the

June 10, 1994, letter and the removal of Appellant from the M&R job. It is not mere speculation to suggest that A-B and Hoffmeister used the cover of Reynolds and the 1997 cost cutting program to eliminate a troublesome Richard Kunkel.

In addition to the fact that there is a genuine dispute as to whether Reynolds was the only decision maker in the November, 1997, decision to place Appellant in the Resource Pool, there are several other material facts overlooked by the trial judge which create genuine disputes as to the cause and effect relationship between Appellant's complaints and his termination. These are distinct from the facts alluded to in Argument V infra in that these occurred at or near the time of this 1997 decision.

First, the work Appellant was doing was still ongoing after his November, 1997, removal from it and it was given to someone else (L.F. 203; 250; 251; 254; 264; 266).

Second, Appellant applied for 30 jobs with A-B after placement in the Resource Pool January 1, 1998, and was not accepted for any of them, though he was qualified for several (L.F. 318-321).

Third, the job specifications for a job extremely similar to his old job were reformulated by A-B to exclude him after he applied for it in 1999 (L.F. 300-304).

Fourth, he applied for four jobs with A-B after his eventual June 30, 1998, termination, without success (L.F. 321, 322).

It is reasonable to conclude from these facts that a genuine dispute exists as to whether the cost reduction program referred to in Reynolds' Affidavit was used to cover the termination

of Appellant's employment for the earlier complaints he made about M&R when A-B's actions toward him in the prior 3 years and 5 months had not been sufficient to run him off.

Appellant suggests that by the standards the Missouri Supreme Court promulgated in the ITT Commercial case at page 378, the trial court overlooked these facts in the record that raise a genuine dispute as to the facts underlying A-B's right to summary judgment.

The cost cutting program referred to in Reynolds' Affidavit is not disputed. What, however, is clearly genuinely disputed in Reynolds' Affidavit, by the deposition testimony of Hoffmeister, Kunkel, Powell and Luhrs, is Hoffmeister's role, along with Reynolds', in carrying out A-B's purpose of ridding itself of Appellant, in this instance, by the cover of the 1997 cost cutting reduction in force.

III.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT'S WHISTLEBLOWING ACTIVITIES WERE THE CAUSE OF HIS TERMINATION BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR A-B IN THAT APPELLANT'S PERSONAL ASSESSMENT THAT HIS DISCHARGE AND A-B'S FAILURE TO REHIRE HIM WAS BASED ON HIS AGE DOES NOT PRECLUDE HIS LATER CONTENTION THAT HIS TERMINATION WAS EXCLUSIVELY CAUSED BY HIS WHISTLEBLOWING WHEN AGE IS JUDICIALLY DECLARED BY A FEDERAL COURT NOT TO BE THE REASON FOR HIS TERMINATION.

The standard of review is de novo, ITT Commercial, supra.

A-B's arguments and the trial court's Order are puzzling as they argue the bearing on exclusivity of the age discrimination charge and prior Complaint in Federal Court.

By way of preface to this point, Appellant notes that there is some question as to whether the whistleblowing contemplated by the public policy exception to the at will employment doctrine must be the exclusive cause of discharge. This was discussed earlier in Point I.

This exclusivity element seems to have been borrowed from those cases decided under the statutory cause of action granted an employee discriminated against for exercising Missouri Workers' Compensation statutory rights. Brenneke, 984 SW2d at page 140 (including fn. 4) suggests several reasons for not specifically adopting "exclusivity" as an element. The statutory form of workers' compensation law and its development suggest that the exclusive causation requirement judicially declared under R.S.Mo. 287.780 is readily distinguished from the common law tort under which Appellant is proceeding in this case. In workers' compensation statutory law there is a negotiated bargain, trade-off, or compromise between employers and employees. The employer gives up common law tort defenses in exchange for exemption from jury trials and a lessened liability exposure. The employee gives up a greater and more complete possible damage recovery in return for no-fault benefits ideally on a more certain and quicker schedule. A tort claim such as that filed by Appellant in this case, on the other hand, is non-statutory and governed by common law. There is no corresponding legislatively negotiated give and take.

In any event, first, as to exclusivity, the Federal Court Complaint was filed in several Counts, as is allowed by all applicable pleading rules. One Count alleged age discrimination, another wrongful discharge as is alleged in this State Court lawsuit (L.F. 158-166).

Second, A-B's argument and the trial court's Order ignores the fact that the wrongful discharge claim was clearly pleaded as an alternative to the age discrimination claim in the Federal Complaint (L.F. 162).

Finally, the Federal Court ruled against Appellant on the age discrimination claim and did not consider the substance of nor rule on the wrongful discharge claim. (L.F. 337). The 8th Circuit upheld the trial judge on the age claim (L.F. 168).

The thrust of A-B's argument and the trial Court's Order on this point implies, at its core, that Appellant himself by his suspicions and feelings that age played a role in A-B's mistreatment of him, and by his allegations to that effect, determines once and for all that his M&R complaints did not cause his termination, despite the Federal Court's judicial findings that age was not the reason for the discharge. That is to say, that Appellant by his suspicions and allegations alleged in the Federal suit, and administrative action, eliminated his M&R complaints as the possible cause of his discharge. Thus the administrative charge and the legal pleadings and discovery conducted in connection therewith are more than allegations and discovery. They are proof!

Authority that speaks responsibly to this issue is the line of both Federal and Missouri State cases that support the "law of the case" doctrine. This doctrine holds, under Federal Practice, that when a court decides upon a rule of law, that decision should continue to govern

the same issues in subsequent stages in the same case Morris v. American National Can Corp., 988 F.2d 50 (8th Cir. 1993); and under State practice, that a former adjudication is conclusive on all points raised and decided and its decision continues to govern throughout all subsequent proceedings Walsh v. Terminal Railroad Association of St. Louis, 196 SW2d 192 (Mo. 1946); Boillot v. Conyer, 861 SW2d 152 (Mo. App. E.D. 1993).

Under this doctrine, and the judgment in the District Court case, age is not the reason for Appellant's termination. He has clearly, however, been mistreated. Another reason, of record, that arguably has caused it is his complaints, all clearly documented in the record. His supposition and allegations as to age have been conclusively shown to be incorrect by Judge Hamilton's ruling, affirmed by the 8th Circuit. Age discrimination was not involved in his removal from M&R, his various employment problems from 1994 through 1997, his eventual termination, and his not being rehired.

Accordingly, even if Appellant's case must prove exclusivity of causation, he and Respondent are precluded not from the retaliation analysis, but from the age discrimination analysis. Appellant strongly suggests that fundamental fairness precludes Respondent from using its age discrimination defense first as a shield and now as a sword. In light of the deceitful conduct of at least one of its employees in authoring the letter sent on M&R's letterhead, which torpedoed Appellant's standing as a trusted employee of Respondent's, and only became known to him long after he filed any documents with the EEOC, it is somewhat disappointing that Respondent would then attempt to base its defense in part on this deceit.

Appellant would argue that by disposing of age as a reason for the treatment he was afforded by A-B, Appellant's allegations as to retaliation for complaining about M&R become far more credible and weighty as the cause and make the dispute on this issue far more genuine.

IV.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE CONDUCT THAT APPELLANT COMPLAINED OF WAS CONDUCT OF HIS EMPLOYER BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR A-B IN THAT THE RELATIONSHIP BETWEEN A-B AND M&R WAS SUCH THAT M&R WAS NOT A "THIRD PERSON" AS TO THE PARTIES, BUT RATHER THE ALTER EGO OR AGENT OF A-B, SUCH THAT ACTIONABLE CONDUCT BY M&R COULD BE IMPUTED TO A-B.

The standard of review is de novo, ITT Commercial, supra.

The trial court in the footnote at page 5 of its Order seems to find that M&R is a "third person" or "customer" of A-B (A5), and in a footnote at page 10 of the Order notes and presumably finds "that the conduct Appellant complained of was not the conduct of Appellant's employer." (A10).

While not further commenting on this observation in its Order the court seems to find that an element of Appellant's case, that is, that he had reported wrongdoing of his employer, is absent from the case and so no genuine dispute as to that element exists.

Again, Appellant submits that the Court has overlooked hugely significant facts that create, at a minimum, a genuine dispute regarding the relationship between A-B and M&R --

one that questions M&R's true independence from A-B. The facts suggest a genuine issue as to whether M&R or A-B were one and the same business entity, or, at a minimum, whether M&R served as an agent or servant of A-B as to the letter of June 10, 1994.

M&R is a warehouse company and A-B is M&R's only warehouse customer and the only product stored in M&R's 17 warehouses, in and around Mt. Vernon, Illinois, belongs to A-B (L.F. 214, 215; 243, line 22, through 244, line 1). M&R and A-B had a long standing relationship under which M&R would invoice to A-B what M&R maintained were the costs associated with storing A-B's product, including rental payments for space allegedly used by M&R for storage of A-B's product (L.F. 195). M&R's survival was dependent on A-B (L.F. 237, lines 9-11). A-B's Sports Marketing (Merchandising) division and the employees of that division were able to obtain goods and services for themselves by means of M&R purchasing these goods and services and then invoicing them to A-B for payment as M&R warehousing charges (L.F. 240-242). M&R charged A-B and was paid for more warehousing space than actually existed (L.F. 195).

Missouri has long recognized the legal principle of an alter ego corporation where the existence of one corporation is entirely dependent upon the acts of another person, whether corporate or individual.

Saidawi v. Giovanni's Little Place, 987 SW2d 501 (Mo. App. E.D. 1999) was a suit brought by the holder of a workers' compensation judgment against a corporation and its principals contending that corporate assets were transferred out of the corporation to another

corporation to avoid the reach of the judgment. The Appellant sought to pierce that corporate veil and the Court of Appeals discussed the alter ego theory at page 505:

> Under the alter ego theory, when a corporation is so dominated by a person as to be a mere instrument of that person and is indistinct from that person controlling it, then the court will disregard the corporate form if to retain it would result in injustice.

Here the facts suggest that M&R was an alter ego of A-B.

If not an alter ego, then under Missouri Law M&R was an agent or servant of A-B, at least with respect to the origination, composition, content and circulation of the damaging June 10, 1994, letter.

M&R was arguably the servant of agent A-B under these facts.

Madsen v. Lawrence, 366 SW2d 413, 415 (Mo. 1963) stated that:

> A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in performance of the service.
>
> A servant is a person employed by a master to perform the service in his affairs whose physical conduct in the performance of the service is controlled or subject to the right of control by the master.
>
> An independent contractor is a person who contracts with another to do something for him, but who is not controlled by the

other nor subject to the others' right to control with respect to his physical conduct in performance of the undertaking.

By the deposition testimony of Bruce Wilson, M&R's managing officer, Terry Floyd, one of A-B's employees, was instrumental in the letter and the strategy behind it (L.F. 227-238). This serves to illustrate the depth of A-B's influence and control over M&R as well as to create a genuine dispute as to whether M&R was really a "third person" or "customer" of A-B or simply an alter ego, agent, or servant for them.

V.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT'S WHISTLEBLOWING ACTIVITIES WERE THE CAUSE OF HIS TERMINATION BASED ON WHAT THE TRIAL COURT INTERPRETED AS A SUBSTANTIAL PASSAGE OF TIME BETWEEN HIS COMPLAINTS AND THE DECISION TO TERMINATE HIM BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT FOR A-B IN THAT EVEN THOUGH APPELLANT'S ACTUAL EMPLOYMENT TERMINATION OCCURRED JUNE 30, 1998, A-B'S EFFORTS TO CAUSE HIM TO QUIT EMPLOYMENT BEGAN IN AT LEAST JUNE, 1994, WITH THE JUNE 10, 1994, DAMAGING LETTER REGARDING HIS JOB PERFORMANCE AT M&R, ACTUALLY AUTHORED BY A-B. EFFORTS TO CAUSE APPELLANT TO QUIT HIS EMPLOYMENT CONTINUED CONSISTENTLY FROM 1994 UNTIL THE DECISION TO PLACE HIM IN THE RESOURCE POOL IN 1997, AND HIS

TERMINATION IN 1998, AND INCLUDED PULLING HIM OFF THE M&R JOB IN 1994, NOT TRYING TO DETERMINE THE TRUTH OF THE JUNE 10, 1994, ALLEGATIONS EVEN THOUGH THEY WERE WIDELY CIRCULATED WITHIN A-B, FAILING TO GIVE HIM RAISES, PROMOTIONS, OR PERFORMANCE EVALUATIONS FOR 1994, 1995, AND 1996, ASSIGNING HIM DEMEANING WORK, AND FINALLY NOT REHIRING HIM FROM THE RESOURCE POOL. THIS COURSE OF CONDUCT DEMONSTRATES THAT THERE WAS NO TRUE "SUBSTANTIAL PASSAGE OF TIME BETWEEN HIS COMPLAINTS AND HIS DISCHARGE," BUT RATHER A CONTINUOUS COURSE OF CONDUCT BY A-B FROM BEFORE JUNE 10, 1994, UNTIL AFTER JUNE, 1998.

The standard of review is de novo, ITT Commercial, supra.

The meaning of the trial court's reference on page 10, footnote 10, to a "substantial passage of time between his complaints and the decision to terminated him" (A10) is unclear. It does not appear to refer to a statute of limitation issue but rather seems used to buttress a conclusion that, by reason of passage of time between complaint and termination, there is no genuine dispute as to the causal relationship between the two. The effect of this purported passage of time was strongly urged on the trial court by A-B as grounds for breaking any connection between Appellant's 1994 complaints and his 1997 Resource Pool placement (L.F. 16, 17 and 24). The trial court apparently was impressed with this argument and mistakenly felt it was actually a nine year passage of time (A2).

In any event, Appellant respectfully suggests that to have arrived at a conclusion that the alleged "substantial passage of time" severs the causal connection between complaints and

discharge, the trial court overlooked numerous references in the record which individually and collectively create, at a minimum, a genuine dispute as to whether there was, in fact, an uninterrupted period of time between June, 1994, and November, 1997, during which Appellant experienced a work environment detrimentally unaffected by A-B's actions.

Pre-dating the M&R letter dated June 10, 1994, were discussions between Floyd and Wilson determining the content and tone of the letter to achieve the maximum detrimental impact on Appellant (L.F. 228 through 252).

The letter itself, Appellant submits, is damaging to the reputation and to the job security of any normal person (L.F. 130 and 131).

Its content was circulated to A-B's employees Floyd (L.F. 129-131), O'Sullivan (L.F. 129), Murdock (L.F. 129), Hoffmeister (L.F. 96), Powell (L.F. 105), and Luhrs (L.F. 118, 119). Additionally, it was discussed between O'Sullivan and Sam Mateer, an M&R owner (L.F. 129).

No efforts (other than talking to Appellant) were made to determine if the allegations against Appellant contained in the letter were true or false (L.F. 261, 295, 297). Thus, whatever the impact of the June, 1994, letter on Appellant's standing with A-B, it was left unaddressed after June, 1994. A review of its content suggests it is specious to argue it had no negative impact! (L.F. 130 and 131)

Appellant was immediately removed from working on the M&R project in Mt. Vernon in June, 1994 (L.F. 259, 278).

On removal from the M&R project in June, 1994, Appellant was given very demeaning and unrewarding work which, given his prior responsibilities and education and training, was a tacit but clear insult and message of disapproval (L.F. 57, 58; 279, 280).

Despite published company policy requiring annual employee work reviews (L.F. 308, 316), Appellant received no work reviews for 1994, 1995, and 1996, and no raises for those years, despite a consistent prior record of positive annual reviews and raises (L.F. 317).

With this series of events continuing through the end of 1994, 1995, and 1996, it is difficult to see how the trial court could find a "substantial passage of time" between Appellant's complaints and his termination, where the use of that term acts to imply a weakening of the causal connection between complaints and his termination. The actions to undermine Appellant and effectively to terminate him as an employee were consistent and continuous throughout, and formally ineffective only because Appellant refused to give in to A-B's subtle yet heavy-handed efforts to be rid of him.

But even beyond that series of continuous disparaging treatment, A-B followed this up by: a) their 1997 decision to include him in the group sent to the Resource Pool (L.F. 35, 36, 207, 208); b) their actions in assigning his work to a less qualified and younger co-worker (L.F. 186); c) their refusal to transfer/hire him to a number of company jobs while he was in the Resource Pool (L.F. 318-321); d) their reformulation of the job requirements for a job suspiciously close to his old job when he applied for it (L.F. 300-304, 321); and e) their failure to hire him after the Resource Pool term expired 6/30/98 (L.F. 321, 322).

As the passage of time between complaints and termination may bear on the element of causation necessary for Appellant to prevail, there is a genuine dispute as to the effect of the undisputed facts (overlooked by the trial court) that occurred between June, 1994, and December, 1997, and then between January 1, 1998, and June 30, 1998, while Appellant was in the Resource Pool.

Moreover, Bell v. Dynamite Foods, 969 SW2d 847 at 853(Mo. App. E.D. 1998) though not granting a discharged employee relief in a public policy exception case, recognized constructive discharge in stating that: ". . . we conclude that constructive discharge should be recognized in common law actions for wrongful discharge claims based upon the common law public policy exception to employment-at-will."

CONCLUSION

The trial court erred in concluding that there are not genuine issues of material fact in this case, and it applied a legal standard of exclusive causation that is unrealistic and unfair and which acts to eviscerate the common law remedy theoretically afforded by the public policy exception to the employment-at-will doctrine. There are, in fact, several genuine issues of material fact that clearly preclude summary judgment and the Appellant respectfully requests that the judgment and order of Judge Grady issued September 5, 2003, be reversed and that the cause be remanded for further proceedings to the Circuit Court of the City of St. Louis.

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CERTIFICATE

I hereby certify, pursuant to Supreme Court Rule 84.06(c) that this Brief complies with the limitation contained in Rule 85.06(b) in that it contains 9,720 words.

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IN THE SUPREME COURT OF MISSOURI

RICHARD KUNKEL,	)	
	)	
Appellant,	)	
	)	
vs.	)	SUPREME COURT NO. SC 86543
	)	
ANHEUSER BUSCH, INC., et al.	)	
	)	
Respondents.	)	

APPENDIX TO APPELLANT'S SUBSTITUTE BRIEF

CONTENTS